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14  
15 UNITED STATES DISTRICT COURT  
16 CENTRAL DISTRICT OF CALIFORNIA  
17

18 CARLA GIESEN, an individual; and  
19 BRYAN GIESEN, an individual,

20 Plaintiffs,

21 v.

22 U.S. BANK LOAN SERVICES, INC.,  
a Delaware Corporation;  
23 HOMECOMINGS FINANCIAL  
SERVICES, LLC (f/k/a Homecomings  
Financial Network, Inc.), a Delaware  
24 Limited Liability Company; WALL ST.  
MORTGAGE, INC., a California  
25 Corporation; and DOES 1 through 50,  
inclusive,

26 Defendants.  
27  
28

Case No. 09-cv-7122-GAF (SSx)

**U.S. BANK NATIONAL  
ASSOCIATION, SUCCESSOR IN  
INTEREST TO THE FEDERAL  
DEPOSIT INSURANCE  
CORPORATION AS RECEIVER  
FOR DOWNEY SAVINGS AND  
LOAN ASSOCIATION, F.A.'S  
MOTION TO DISMISS  
PLAINTIFFS' FIRST AMENDED  
COMPLAINT FOR FAILURE TO  
STATE A CLAIM**

Date: 12/21/09  
Time: 9:30 a.m.  
Crtrm.: 740

Hon. Gary A. Feess

[Complaint Filed: July 27, 2009]

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1  
2 U.S. Bank National Association, Successor in Interest to the Federal Deposit  
3 Insurance Corporation as Receiver for Downey Savings and Loan Association, F.A.  
4 ("U.S. Bank") hereby submits its memorandum of points and authorities in support  
5 of its motion to dismiss Plaintiffs' First Amended Complaint ("FAC") for failure to  
6 state a claim as follows:

7 **I.**

8 **INTRODUCTION**

9 Plaintiffs' FAC is as flawed as Plaintiffs' original complaint. Plaintiffs'  
10 amendment, while it has addressed the statute of limitations problem with their  
11 original complaint, has done nothing to remedy the other deficiencies identified by  
12 U.S. Bank in its motion to dismiss their original pleading. Thus, Plaintiffs' FAC  
13 should be dismissed for the reasons outlined below.

14 The fundamental flaw with Plaintiff's first claim for relief, for rescission  
15 pursuant to the Truth in Lending Act ("TILA"), is that it seeks to turn U.S. Bank  
16 into an unsecured creditor that can only hope Plaintiffs have the financial ability to  
17 honor their admitted obligation to tender the loan proceeds to U.S. Bank. Courts  
18 within the Ninth Circuit and across the country have recognized the inequity in such  
19 a result and have refused to entertain TILA rescission claims without specific  
20 allegations demonstrating the plaintiff's ability to tender the loan proceeds if the  
21 court were to order rescission.

22 This result makes sense – it would be a waste of all parties' and the Court's  
23 resources to take a TILA rescission claim to judgment only to learn that the plaintiff  
24 lacks the financial ability to tender the loan proceeds. Thus, courts have regularly  
25 addressed these issues at the pleading stage and have dismissed TILA rescission  
26 lawsuits where plaintiffs have been unable to allege facts demonstrating their ability  
27 to repay the loan proceeds. Indeed, some courts have gone so far as to issue orders  
28 to show cause requiring plaintiffs to present proof of their ability to tender before

1 ruling on a motion to dismiss. *See e.g. Hernandez v. Wells Fargo Bank, N.A.*, 09-  
2 CV-1910 H, Doc. No. 18 (S.D. Cal. November 12, 2009).

3 At the very least, more detailed allegations regarding Plaintiffs' alleged  
4 financial ability to tender are required here. Plaintiffs admit in their FAC that they  
5 must, as a condition to rescission under TILA, tender the loan proceeds to U.S.  
6 Bank. Plaintiffs then allege, without any supporting facts, that they have the ability  
7 to tender the \$267,750 they admit they received from U.S. Bank. More is required  
8 under the caselaw interpreting the TILA tender requirement. Accordingly, U.S.  
9 Bank respectfully requests that the Court dismiss Plaintiffs' TILA rescission claim.

10 Plaintiffs' second and final claim for relief, for alleged violations of California  
11 Business and Professions Code section 17200, must also be dismissed. Plaintiffs  
12 seek to use their section 17200 claim to revive an otherwise time-barred TILA  
13 damages claim, something they clearly may not do under Ninth Circuit law. Thus,  
14 Plaintiffs' second claim for relief should be dismissed as well.

## 15 II.

### 16 LEGAL STANDARD

17 A Rule 12(b)(6) motion tests the sufficiency of the complaint. *Navarro v.*  
18 *Block*, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal is warranted under Rule  
19 12(b)(6) where the complaint lacks a cognizable legal theory. *Robertson v. Dean*  
20 *Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984); *see Neitzke v. Williams*,  
21 490 U.S. 319, 326 (1989) ("Rule 12(b)(6) authorizes a court to dismiss a claim on  
22 the basis of a dispositive issue of law."). Alternatively, a complaint may be  
23 dismissed where it presents a cognizable legal theory yet fails to plead essential  
24 facts under that theory. *Robertson*, 749 F.2d at 534.

25 In reviewing a motion to dismiss under Rule 12(b)(6), the court must assume  
26 the truth of all properly pled factual allegations and must construe them in the light  
27 most favorable to the nonmoving party. *Thompson v. Davis*, 295 F.3d 890, 895 (9th  
28 Cir. 2002), *cert denied*, 538 U.S. 921 (2003). While the allegations of the complaint

1 are generally accepted as true, the complaint must allege "enough facts to state a  
 2 claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 127 S.  
 3 Ct. 1955, 1974 (2007). "[A] plaintiff's obligation to provide 'grounds' of his  
 4 'entitlement to relief requires more than labels and conclusions, and a formulaic  
 5 recitation of the elements of a cause of action will not do." *Id.* at 1964-65 (internal  
 6 quotation and citation omitted). "Nor does a complaint suffice if it tenders 'naked  
 7 assertion[s]' devoid of 'further factual enhancement.'" *Ashcroft v. Iqbal*, 556 U. S.  
 8 \_\_\_\_\_, 129 S.Ct. 1937, 2009 WL 1361536 (2009) (Slip. op. at 14).

9 Further, legal conclusions need not be taken as true merely because they are  
 10 cast in the form of factual allegations. *Roberts v. Corrothers*, 812 F.2d 1173, 1177  
 11 (9th Cir. 1987); *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981).  
 12 "Nor is the court required to accept as true allegations that are merely conclusory,  
 13 unwarranted deductions of fact, or unreasonable inferences." *Sprewell v. Golden*  
 14 *State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001), *amended by* 275 F.3d 1187 (9th  
 15 Cir. 2001). When ruling on a motion to dismiss, the court may consider the facts  
 16 alleged in the complaint, documents attached to the complaint, documents relied  
 17 upon but not attached to the complaint when authenticity is not contested, and  
 18 matters of which the court takes judicial notice. *Parrino v. FHP, Inc.*, 146 F.3d 699,  
 19 705-06 (9th Cir. 1998).

20 "To survive a motion to dismiss, a complaint must contain sufficient factual  
 21 matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"  
 22 *Ashcroft v. Iqbal*, 556 U. S. \_\_\_\_\_, (Slip. op. at 14). "A claim has facial plausibility  
 23 when the plaintiff pleads factual content that allows the court to draw the reasonable  
 24 inference that the defendant is liable for the misconduct alleged." *Id.* "The  
 25 plausibility standard is not akin to a 'probability requirement,' but it asks for more  
 26 than a sheer possibility that a defendant has acted unlawfully." *Id.* "Where a  
 27 complaint pleads facts that are 'merely consistent with' a defendant's liability, it  
 28 'stops short of the line between possibility and plausibility of 'entitlement to relief.'"



1 *Id.* "Rule 8 marks a notable and generous departure from the hyper-technical, code-  
 2 pleading regime of a prior era, but it does not unlock the doors of discovery for a  
 3 plaintiff armed with nothing more than conclusions." *Id.*

### 4 III.

### 5 DISCUSSION

#### 6 A. Plaintiffs' TILA Rescission Claim Must Be Dismissed For Their Failure To 7 Allege Facts Demonstrating Their Ability To Tender The Loan Proceeds.

8 Plaintiffs claim that U.S. Bank violated TILA by allegedly failing to properly  
 9 disclose the negative amortization features of their loan. (FAC ¶ 15.) Based upon  
 10 this violation, Plaintiffs purport to have cancelled their loan via a July 24, 2009  
 11 letter sent by their attorney to U.S. Bank. (FAC ¶ 11.)

12 To obtain rescission pursuant to TILA, "an obligor shall tender the property to  
 13 the creditor." 15 U.S.C. § 1635(b). That is, "prior to ordering rescission based on a  
 14 lender's alleged TILA violations, a court may require borrowers to prove ability to  
 15 repay loan proceeds." *Garza v. American Home Mortgage*, 2009 WL 188604 at \*4,  
 16 (E.D. Cal., Jan. 27, 2009) (granting motion to dismiss where the complaint failed to  
 17 sufficiently allege facts demonstrating the plaintiff's ability to repay the loan  
 18 proceeds). "[R]escission should be conditioned on repayment of the amounts  
 19 advanced by the lender." *Yamamoto v. Bank of New York*, 329 F.3d 1167, 1171 (9th  
 20 Cir. 2003); *see LaGrone v. Johnson*, 534 F.2d 1360, 1362 (9th Cir. 1976) ("[T]he  
 21 district court erred in not conditioning rescission on the tender of the net amounts  
 22 advanced by the [lender]."). If the borrowers are "unable to tender the loan  
 23 proceeds, the remedy of unconditional rescission [is] inappropriate." *American*  
 24 *Mortgage Network, Inc. v. Shelton*, 486 F.3d 815, 821 (4th Cir. 2007).

25 Plaintiffs do not allege that they have tendered the remaining loan proceeds,  
 26 nor do they provide any facts to support their conclusory allegation that they have  
 27 the ability to do so. The best they do is plead that, "after Defendant USB has  
 28 tendered its proceeds and taken action to reflect that its interest in the security has



1 been eliminated, Plaintiffs will tender their proceeds (and have the ability to do so)  
 2 given to them by Defendant USB in accordance with applicable statutes and case  
 3 law." (FAC ¶ 16.) This is not enough. The tender requirement (and the fact that  
 4 courts generally require the tender prior to rescission) is meant to protect the lender  
 5 against becoming an unsecured creditor of a borrower who cannot pay back the  
 6 substantial loan money that he or she has received. *See American Mortgage*  
 7 *Network*, 486 F.3d at 821 ("Clearly it was not the intent of Congress to reduce the  
 8 mortgage company to an unsecured creditor or to simply permit the debtor to  
 9 indefinitely extend the loan without interest.").

10 Plaintiffs' FAC's failure to allege any facts demonstrating their ability to  
 11 tender the loan proceeds is fatal to their TILA rescission claim. "The absence of a  
 12 sufficiently alleged . . . tender of loan proceeds dooms [their] TILA rescission  
 13 attempt to warrant its dismissal." *Rendon v. Countrywide Home Loans, Inc.*, 2009  
 14 WL 3126400 at \*6 (E.D. Cal., Sept. 24, 2009); *see Angulo v. Countrywide Home*  
 15 *Loans, Inc.*, 2009 WL 3427179 at \*4 (E.D. Cal., Oct. 26, 2009) ("The Plaintiffs . . .  
 16 cannot state a claim for rescission under TILA without at least alleging that they are  
 17 financially capable of tendering the loan proceeds."); *Lal v. American Home*  
 18 *Mortgage Servicing, Inc.*, 2009 WL 3126450 at \*2 (E.D. Cal., Sept. 24, 2009)  
 19 (granting a motion to dismiss plaintiffs' TILA rescission claim where they "failed to  
 20 allege that they are ready and able to tender the loan proceeds.").

21 Nor does the order of tender set forth in section 1635 relieve Plaintiffs of their  
 22 obligation to allege facts demonstrating their financial ability to tender:

23 Ms. Garza correctly notes that 12 C.F.R. § 226.23(d) sets out  
 24 procedural steps for TILA rescission. Ms. Garza appears to contend  
 25 that her complaint is her notice of rescission in that it alleges: "Plaintiff  
 26 now gives effective notice to rescind the Transaction without further  
 notice, hereby surrenders the Property or its equivalent in value  
 determined by application of all proceeds since origination ..." The  
 complaint references no prior notice of rescission.

27 Ms. Garza's problem is that the complaint fails to address head on her  
 28 ability to tender loan proceeds. The complaint fails to hint that Ms.

1 Garza is able to fulfill her obligations under 15 U.S.C. § 1635(b) and  
 2 12 C.F.R. § 226.23(d). **Rescission is an empty remedy without Ms.**  
 3 **Garza's ability to pay back what she has received (less interest,**  
 4 **finance charges, etc.).** The complaint lacks a necessary element of  
 5 Ms. Garza's TILA rescission claim. As such, the TILA rescission claim  
 6 is dismissed with leave to amend to allege, **subject to F.R.Civ.P. 11(b)**  
 7 **requirements,** that Ms. Garza has the ability to tender and pay back  
 8 what she has received.

9 *Garza*, 2009 WL 188604 at \*5. Conclusory allegations of Plaintiffs' ability to  
 10 tender are insufficient to support this element of Plaintiffs' TILA rescission claim.  
 11 *Ashcroft*, 556 U.S. \_\_\_, (Slip op. at 14). As a result, Plaintiffs' TILA rescission  
 12 claim must be dismissed.<sup>1</sup>

13 B. Plaintiffs' Unlawful And Unfair Business Practices Claim Is Preempted.

14 Plaintiffs allege that U.S. Bank violated California Business and Professions  
 15 Code section 17200 by failing to make various disclosures mandated by TILA  
 16 and/or making such disclosures in a misleading manner. (FAC ¶ 19.) Plaintiffs thus  
 17 seek to use section 17200 to recover money from U.S. Bank for what amount to  
 18 alleged TILA violations.

19 Plaintiffs, however, have not asserted a TILA damages claim under 15 U.S.C.  
 20 § 1640, nor could they insofar as the limitations period on such a claim has long  
 21 since run. Instead, Plaintiffs seek to use section 17200 as an end-run around TILA's  
 22 damages limitations period to recover money on an otherwise time-barred claim.  
 23 The law is clear that they cannot do so and, as a result, their second cause of action  
 24 should be dismissed.

25 <sup>1</sup> To the extent Plaintiffs also seek damages as a result of U.S. Bank's alleged  
 26 failure to honor their rescission notice, as the Court noted in its order granting  
 27 U.S. Bank's motion to dismiss Plaintiffs' original complaint, this claim fails if  
 28 Plaintiffs' TILA rescission claim fails. (Doc. No. 12 at 4.) If Plaintiffs seek  
 damages for TILA disclosure violations, those claims are time-barred for the  
 reasons discussed below.

1           1.     Any TILA damages claim Plaintiffs might bring is time-barred.

2           The allegations in the FAC demonstrate that any TILA damages claim  
3 Plaintiffs might bring based on loan-related disclosures would be time-barred. A  
4 TILA damages claim must be brought "within one year from the date of the  
5 occurrence of the violation." 15 U.S.C. § 1640(e). In the Ninth Circuit, this  
6 limitations period runs from the date the loan transaction is consummated. *See King*  
7 *v. State of California*, 784 F.2d 910, 915 (9th Cir. 1986).

8           Here, Plaintiffs admit that the loan transaction was consummated on July 26,  
9 2006. (FAC ¶ 6.) Plaintiffs did not file their original complaint until July 27, 2009,  
10 long after the TILA damages limitations period had run on July 26, 2007. Thus, any  
11 TILA damages claim Plaintiffs might bring based on the alleged disclosure  
12 violations they attempt to challenge with their section 17200 claim would be time-  
13 barred.

14           2.     California law is preempted to the extent Plaintiffs seek to use it to  
15                   circumvent federal limitations periods imposed on TILA damage  
16                   claims.

17           Congress's power to preempt state law flows from the Supremacy Clause of  
18 the United States Constitution. U.S. Const., Art VI, cl.2; *Cipollone v. Liggett*  
19 *Group, Inc.*, 505 U.S. 504, 516 (1992). There are three different types of federal  
20 preemption: (1) express preemption; (2) field preemption; and (3) conflict  
21 preemption. *Bank of America v. City and County of San Francisco*, 309 F.3d 551,  
22 558 (9th Cir. 2002). Congress may delegate its authority to preempt state laws to a  
23 federal agency, as it did in this case through the Home Owners' Loan Act ("HOLA")  
24 and the creation of the Office of Thrift Supervision ("OTS"). As the United States  
25 Supreme Court settled conclusively in *Fidelity Fed. Sav. & Loan Ass'n v. de la*  
26 *Cuesta*, in enacting the HOLA, Congress gave the OTS all the necessary authority to  
27 promulgate regulations with the same preemptive force as direct congressional  
28

1 legislation. 458 U.S. 141, 162-63 (1982).<sup>2</sup> Pursuant to HOLA, the OTS has  
 2 promulgated broad regulations that govern the operations of every federal savings  
 3 and loan association, such as Defendant. *Bank of America*, 309 F.3d at 558; 12  
 4 C.F.R. ch. V, pts. 500-591.

5 One of those regulations, 12 C.F.R. § 560.2, provides that state laws may not  
 6 regulate a federal thrift's lending activities. Section 560.2 provides, in pertinent part  
 7 that:

8 OTS hereby occupies the entire field of lending regulation for federal  
 9 savings associations. OTS intends to give federal savings associations  
 10 maximum flexibility to exercise their lending powers in accordance  
 11 with a uniform federal scheme of regulation. ***Accordingly, federal  
 savings associations may extend credit as authorized under federal  
 law, including this part, without regard to state laws purporting to  
 regulate or otherwise affect their credit activities . . .***

12  
 13 12 C.F.R. § 560.2(a) (emphasis supplied). Among the specific examples of the  
 14 types of state laws that are preempted under section 560.2, are any state laws that  
 15 purport to regulate a thrift's loan-related disclosure obligations. 12 C.F.R. §  
 16 560.2(b)(9); *Silvas v. E\*Trade Mortg. Corp.*, 421 F.Supp.2d 1315, 1319-20 (S.D.  
 17 Cal. 2006) (holding that plaintiffs' unfair competition law claims were preempted  
 18 because they sought to regulate a lender's conduct in connection with its TILA  
 19 disclosures) *aff'd* 514 F.3d 1001 (9<sup>th</sup> Cir. 2008).<sup>3</sup>

20 <sup>2</sup> Generally, the preemption analysis begins with a presumption against  
 21 preemption. However, where a state seeks to regulate a particular area of the  
 22 law that has had a significant federal presence, the presumption against  
 23 preemption is not triggered. *United States v. Locke*, 529 U.S. 89, 108 (2000).  
 24 Banking regulation is just such an area: "Congress has legislated the field of  
 25 banking from the days of *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 325-  
 26 26, 426-27, 4 L.Ed. 579 (1819), creating an extensive federal statutory and  
 regulatory scheme." *Bank of America*, 309 F.3d at 558. Thus, no presumption  
 against preemption arises when a state law regulates the banking industry. *Id.* at  
 559 ("[B]ecause there has been a history of significant federal presence in  
 national banking, the presumption against preemption of state law is  
 inapplicable.").

27 <sup>3</sup> The OTS' promulgation of this regulation did not exceed the authority Congress  
 28 delegated to it under HOLA. *American Bankers Ass'n v. Lockyer*, 239 F. Supp.  
 2d 1000, 1011-12 (E.D. Cal. 2002). Moreover, the OTS has concluded that even

In *Silvas*, the district court specifically considered and rejected what Plaintiffs seek to do here: Take advantage of the longer limitations period under section 17200 to seek relief for alleged TILA violations that would have otherwise been time-barred. 421 F.Supp.2d 1315, 1320 (S.D. Cal. 2006), aff'd, *Silvas v E\*Trade Mortg. Corp.*, 514 F.3d 1001 (9th Cir. 2008). There, the court held that the plaintiffs' action was just "... an attempt to use California's UCL to regulate the defendants' lending activities, to secure damages under state law for alleged TILA violations where a federal cause of action was no longer available. The application of the UCL to Defendant ... is therefore ... preempted by section 560.2." *Id.* The same is true of Plaintiffs' claim in this case insofar as it is based on alleged TILA violations and the Court should therefore dismiss it with prejudice.<sup>4</sup>

#### IV.

#### CONCLUSION

For the foregoing reasons, U.S. Bank respectfully requests that the Court grant its motion to dismiss Plaintiffs' FAC in its entirety.

November 20, 2009

SHEPPARD MULLIN RICHTER & HAMPTON LLP

By

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state laws that do no more than parrot TILA's requirements are preempted. *See Silvas*, 421 F.Supp.2d at 1319 n. 2.

<sup>4</sup> Plaintiffs have not pled a section 17200 claim based on U.S. Bank's alleged failure to properly respond to their TILA rescission notice, nor can they insofar as their TILA rescission claim fails for the reasons discussed above. (Doc. No. 12 at 4) (holding that a plaintiff must assert a viable underlying violation of a law to bring a section 17200 claim).